In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 171

THE UNITED STATES OF AMERICA, APPELLANT

v.

JOE BURNISON, PHIL KATZ, AS PUBLIC ADMINISTRATOR OF THE CITY AND COUNTY OF SAN FRANCISCO, APPELLEES

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this case. The date of the judgment entered by the Supreme Court of California is March 22, 1949. The petition for appeal is presented to the Supreme Court of the United States herewith, to wit, on June 15, 1949.

JURISDICTION

The statutory jurisdiction of the Supreme Court of the United States to review by direct appeal the decision in this case is conferred by Section 1257(2) of Title 28 U. S. C., as codified by the act approved June 25, 1948, effective September 1, 1948. The following cases are believed to sustain

the jurisdiction of the Supreme Court: *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U. S. 285; *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania,* 318 U. S. 261; *Standard Oil Co. of California* v. *Johnson, Treasurer of the State of California,* 316 U. S. 481; *United States* v. *Klein,* 303 U. S. 276.

STATE STATUTE INVOLVED

The statute of the State of California which was held to be valid but which the appellant contended was unconstitutional is the Probate Code of California, particularly Section 27, which provides as follows:

> *Who may take by will.* A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanitorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute.

THE ISSUES AND THE RULING BELOW

Upon his death on February 23, 1946, Gust Burnison, also called Gustave Burnison, a resident of San Francisco, California, left a holographic will, in which he stated: "This is my last will & wish that I give all I own and possess to the United States Government, U. S. A. The beneficiary shall be executor. My body shall be cremated after death"

(Tr.[1] 2). The Superior Court of the State of California in and for the City and County of San Francisco admitted this document as the last will and testament of the decedent on the petition of Phil C. Katz, Public Administrator of the City and County of San Francisco and appointed him as administrator with the will annexed (Tr. 8). The value of personal property left by the decedent was appraised at $22,668.70 (Tr. 9-17).

The heirs-at-law, three brothers, one sister and thirteen nieces and nephews, petitioned for distribution of the whole estate to themselves on the ground that "The United States of America is not authorized by statute or otherwise to take under a will" executed in California by a California resident (Tr. 18, 20), that "the United States of America is not authorized to take by will under the provisions of Section 27, Probate Code of the State of California or under any other statute or law of the State of California" (Tr. 21) and hence that the bequest to the United States was void (Tr. 21). In opposition to the heirs' petition, the United States of America urged that the Government was a person or corporation authorized to take by will pursuant to Section 27. The Superior Court sustained the Government's objections and dismissed the petition (Tr. 31).

The appeal of the heirs to the Supreme Court of California was referred for hearing and decision to the District Court of Appeals, State of California, First Appellate District, as authorized by Article VI, Section 4c of the Constitution of the

[1] References, unless otherwise noted, will be to the pages in the typewritten Clerk's Transcript on Appeal, upon which the case was reviewed by the Supreme Court of California and which is included in the transcript certified to this Court.

State of California. In the District Court of Appeals, the United States urged *inter alia* that if Section 27 of the Probate Code were construed as invalidating the bequest to the United States, serious constitutional questions would arise. The District Court of Appeals, however, reversed the order of the Superior Court. 87 Adv. Cal. App. 310.[2] That court construed Section 27 as not sanctioning bequests or devises to the United States *eo nomine*. 87 Adv. Cal. App. at 312. It further stated that the contention of the United States as to constitutionality of the statute is answered by *Irving Trust Co.* v. *Day*, 314 U. S. 556, 87 Adv. Cal. App. at 313.

The United States, in its petition for a hearing by the Supreme Court of California, urged that if the state law should be construed as invalidating this bequest, it would violate the Federal Constitution. The Government contended that the statute would then effect an unlawful discrimination against the United States, and would infringe the inherent sovereign power of the United States, derived from the Constitution, to acquire property by will.

The Supreme Court of California sitting in bank reversed the order of the Superior Court, one judge dissenting, 33 Adv. Cal. 613. The court stated that the state has the exclusive power to designate those who may take property by descent and hence that "section 27 * * * prescribing 'who may take by will,' must be construed as determinative of the validity of the bequest here in question" (p. 615). It construed Section 27 as excluding the United States and all other states except California from

[2] Apparently through oversight, this case has been omitted from the bound volume of 87 California Appellate Reports.

among the eligible beneficiaries (p. 617). After citing and quoting from *United States* v. *Fox*, 94 U. S. 315 and *United States* v. *Perkins*, 163 U. S. 625, the California Supreme Court commented (p. 618):

> * * * And as recently as 1942 the Supreme Court of the United States in *Irving Trust Co.* v. *Day*, 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A. L. R. 1093], wherein was sustained the validity of a section of the "New York Decedent Estate Law" concerning the right of a surviving spouse to elect to take against the provisions of a will, cited both the Fox and Perkins cases, *supra*, among others, in support of its broad statement at page 562, as follows: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and *the dead hand rules succession only by sufferance.* Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (Emphasis in opinion) * * *

The Court continued (p. 618):

> The government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, "serious constitutional questions would arise" involving an "unlawful discrimination against the United States" is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, *supra*, and the claim that assuming "the Fox case cannot be distinguished, it must be regarded as over ruled" are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

The Court further stated (p. 619):

> * * * It is true that the capacity of the United States to "receive a voluntary devise or bequest" has been regarded as an "inherent attribute of sovereignty" and so sustained as an implied power of the federal government, but such principle has no force where there is an "express statute" of the state wherein "the testator had his domicil" effecting "a restriction as to who may be devisees or legatees." (*Dickson* v. *United States*, 125 Mass. 311, 315 [28 Am. Rep. 230].) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take "under a will." (*United States* v. *Fox, supra*, 94 U. S. 315; *United States* v. *Perkins, supra*, 163 U. S. 625; *Irving Trust Co.* v. *Day, supra*, 314 U. S. 556.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

1. The appeal in this case presents the question whether a state may deny to the United States the right to receive a gift willed to it by a decedent domiciled in that state.

(a) There can be no question this date that the United States as a body politic established by the Constitution has the capacity, by virtue thereof, to receive voluntary bequests and devises, as an incident to that sovereignty. *Dickson* v. *United States*, 125 Mass. 311, 313-315. That power has as its source the same fountainhead, *i.e.*, the general right of sovereignty, as the powers, which the United States has been held to have despite the absence of an express constitutional provision, to enter contracts (*United States* v. *Maurice*, 2 Brock. 96, 109 (opinion by Chief Justice Marshall); *United*

States v. *Tingey*, 5 Pet. 115, 128 (opinion by Mr. Justice Story)), to sue in its own name (*Dugan* v. *United States*, 3 Wheat. 172, 181), to requisition property (*Kohl* v. *United States*, 91 U. S. 367), and to take security for debts to the United States. *United States* v. *Bradley*, 10 Pet. 343, 359; *United States* v. *Linn*, 15 Pet. 290, 311; *Neilson* v. *Lagow*, 12 How. 98, 107-108. "To adopt a different principle, would be to deny the ordinary rights of sovereignty, not merely to the general government, but even to the state governments, within the proper sphere of their own powers, unless brought into operation by express legislation." *United States* v. *Tingey*, 5 Pet. 115, 128.

The United States has long received testamentary gifts from decedents domiciled in virtually all states (cf. *Dickson* v. *United States*, 125 Mass. 311, 315); the sole exceptions are California in the present cases[3] and New York in regard to devises of realty (see *United States* v. *Fox*, 94 U. S. 315, discussed *infra*, p.). Since the earliest days of the Government, the Treasury Department has, in the exercise of this implied power, accepted these gifts without question.[4] Although Congress has never enacted a general statute authorizing the acceptance of testamentary bequests, it has in several statutes dealing with various aspects of such gifts, assumed the existence of the power in the United States to accept them. Thus, Congress

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[3] Prior to the present cases, the United States had received a number of bequests and devises under the wills of California domiciliaries.

[4] A bequest to the United States without limitation as to use goes into "Miscellaneous Receipts." A bequest to or for the use of a particular agency authorized by statute to receive testamentary gifts for specific purposes goes into a special fund "as * * * authorized by law."

has, by special legislation, authorized the acceptance of specific testamentary gifts willed to the United States for designated purposes. Act of August 10, 1846, c. 178, 9 Stat. 102 (Smithsonian Institution); Joint Resolution of June 22, 1938, c. 595, 52 Stat. 943 (home of the late Justice Holmes); Act of July 15, 1935, c. 381, 49 Stat. 481. It has authorized several agencies generally to receive testamentary gifts for specific purposes apparently for the purpose of encouraging such gifts. Act of March 3, 1865, c. 91, 13 Stat, 509, as amended by the Act of January 23, 1873, c. 51, 17 Stat. 417 (National Home for Disabled Volunteer Soldiers); Act of March 3, 1925, c. 423, 43 Stat. 1107, 2 U. S. C. 154 *et seq.* ("Library of Congress Trust Fund Board"); Title XI of the Second War Powers Act, 1942, c. 199, 56 Stat. 176, 183 (gifts for a particular war purpose);[5] cf. Act of June 25, 1910, c. 384, as amended, 36 Stat. 703, 736, 55 Stat. 868, 38 U. S. C. 17 *et seq.* (National Home for Disabled Volunteer Soldiers); *United States* v. *Stevens,* 302 U. S. 623; *National Home* v. *Wood,* 299 U. S. 211. And it has provided by legislation for the sale of land devised to the United States (32 Stat. 1112, 40 U. S. C. 304), for the disposition of bequests to the United States of United States bonds (59 Stat. 48, 31 U. S. C. 757e), and for the deduction of the value of bequests and devises to

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[5] See, in addition, the following statutes authorizing acceptance of testamentary gifts for purposes stated: 5 U.S.C. 393 (Post Office Department Library); 5 U.S.C. 721 (Civil Service employees generally); 16 U.S.C. 715d (sanctuaries for migratory birds); 20 U.S.C. 55, 74(b) (Smithsonian Institution and National Gallery of Art); 22 U.S.C. 809 (Foreign Service); 24 U.S.C. 181 (St. Elizabeth's Hospital); 34 U.S.C. 1115, 1116, 1118 (Naval Academy and its Museum); 38 U.S.C. 14 (hospitalized disabled veterans); 42 U.S.C. 219 (Public Health Service); 44 U.S.C. 300cc (National Archives).

the United States from the gross estate in the computation of Federal inheritance tax (26 U. S. C. 812(d)).

(b) While the Supreme Court of California recognized that the United States has the capacity, incident to its sovereignty to receive such gifts (33 Adv. Cal. at 619) it held that the right of the United States to receive these gifts was subject to the state's power over the devolution of property. This holding was predicated on broad generalities in the decisions of this Court (*United States* v. *Fox*, 94 U. S. 315; *United States* v. *Perkins*, 163 U. S. 625; *Irving Trust Co.* v. *Day*, 314 U. S. 556) to the effect that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction" (314 U. S. at 562). In relying on these generalities, however, the California Supreme Court improperly failed to give any weight to the fact that a state's power over the descent of property is subject to the limitations and protections afforded by the Constitution, for it is "under our Constitution [that] the devolution of property is determined by the laws of the several States." *Snyder* v. *Bettman*, 190 U. S. 249, 252. It is clear, for example, that a tax imposed on the descent of property may involve such an arbitrary or unreasonable exercise of the power as to violate the equal protection clause of the Fourteenth Amendment. *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Campbell* v. *California*, 200 U. S. 87, 94; *Keeney* v. *New York*, 222 U. S. 525, 535; *Maxwell* v. *Bugbee*, 250 U. S. 525, 540; *Stebbens* v. *Riley*, 268 U. S. 137, 142. And the denial by a state to residents in other states of the right to take legacies

which it granted to its own citizens may violate the privileges and immunities clause of the Fourteenth Amendment. *Maxwell* v. *Bugbee*, 250 U. S. 525, 543-544 (Mr. Justice Holmes dissenting).

That the power of the states over the descent of property is limited by the Constitution is strikingly demonstrated in *Clark* v. *Allen*, 331 U. S. 503. There, this Court sustained the right of an alien enemy, whose interest had become vested in the Alien Property Custodian, to a devise of realty under Article IV of the Treaty of Friendship with Germany (44 Stat. 2132), notwithstanding the inconsistent provisions of the California law. The Court noted that since "the provisions of the treaty have not been superseded or abrogated, they prevail over any requirements of California law which conflict with them" (331 U. S. at 508). It further commented (at 517):

> Rights of succession to property are determined by local law. See *Lyeth* v. *Hoey*, 305 U. S. 188, 193; *Irving Trust Co.* v. *Day*, 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. *Hauenstein* v. *Lynham* [100 U. S. 483, 488-490]. Then the state policy must give way.[6]

An analogous limitation likewise stemming from Article V of the Constitution is applicable here. The United States receives testamentary gifts as an incident to its sovereignty established by the Constitution and hence a state policy which purports to invalidate these gifts, and so is inconsistent with the sovereignty of the United States must

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[6] Cf. *Sunderland* v. *United States*, 268 U. S. 226, 232-233; see, also, *Stebbins* v. *Riley*, 268 U. S. 137, 140.

likewise, we submit, give way, for under Article VI, "the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts and the people, 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'" *Testa* v. *Katt*, 330 U. S. 386, 391.

(c) *United States* v. *Fox*, 94 U. S. 315, in which this Court invalidated a devise of realty to the United States which was not sanctioned by the law of New York, the state in which the realty was located, is, we submit, no longer controlling. As we have shown, *supra*, p. —, this Court's subsequent decisions recognizing constitutional limitations on the power of the states over the descent of property undercut the broad ground of the *Fox* decision that such state power is absolute and exclusive. Furthermore, the *Fox* decision was of questionable soundness even at the time it was rendered. In the first place, the Court there considered the problem raised to be the broad question whether the devolution of property within a state was governed by state or federal law. But the primary power of the states to determine who shall take testamentary gifts was not disputed. The United States assumed such power in the states, and urged, as it does here, that the United States may, as an incident to its sovereignty, take testamentary gifts independently of the provisions of state law. In the second place, the Court regarded as applicable the English Statute of Wills and the Statute of 32 Hen. VIII which, it noted, had been carried over into New York law. But in so doing, the Court disregarded the further principle of English common law that bequests for the benefit of the country are valid (see, *e.g.*, *Newland* v. *Attorney General*,

3 Meriv. 684; *Nightingale* v. *Coulburn*, 5 Hare 484, 2 Phillips 594; *Ashton* v. *Langdale*, 15 Jur. 868) and did not attempt to reconcile these principles in the light of our dual system of state and federal sovereignties with the federal government supreme by virtue of Article VI of the Constitution. In these circumstances, this Court should, we submit, overrule the *Fox* case, just as it has already overruled *Doyle* v. *Continental Insurance Co.*, 94 U. S. 535, rendered contemporaneously with *Fox*. In the *Doyle* case, this Court had affirmed the states' power to require a foreign corporation to waive its right to resort to federal courts as a condition of admission into the state, but it subsequently overruled that decision "because the sovereign power of a State in excluding foreign corporations, as in the exercise of all others of its sovereign power, is subject to the limitations of the supreme fundamental law." *Terral* v. *Burke Construction Co.*, 257 U. S. 529, 532-533.[1]

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[1] *United States* v. *Perkins*, 163 U. S. 625, also relied upon by the California Supreme Court, is distinguishable. In that case, this Court (citing the *Fox* case) sustained the power of the states to tax a bequest to the United States on the stated ground that the states, in the exercise of their power over the descent of property may attach any condition to their sanctioning of such devolution. Subsequent decisions, however, have explained the *Perkins* case as also resting on the independent power of the states to tax the transfer of property. *Knowlton* v. *Moore*, 178 U. S. 41, 57-58; *Snyder* v. *Bettman*, 190 U. S. 249, 252. In these later cases, this Court rejected the contention that the authority to lay a succession tax arose solely from the power to regulate the descent of property. It held, despite the intergovernmental immunity doctrine then in full bloom, that the United States, along with the states, has power to tax transfers of property and accordingly sustained a tax levied by the United States on a bequest to a state. See, also, *Greiner* v. *Lewellyn*, 258 U. S. 384 (sustaining a federal tax on a bequest of municipal bonds). As thus explained by this Court, the *Perkins* case clearly provides no support, independently of the *Fox* case, for the holdings of the California

2. The appeal will present the further substantial question whether Section 27 of the Probate Code, as construed by the Supreme Court of California, has a discriminatory effect against the United States in violation of Article VI of the Constitution. As construed by the California Supreme Court, Section 27 forbids the United States and any state, other than the State of California, from taking testamentary gifts under the wills of Californian domiciliaries. The California Court's holding that this statute, as thus construed, did not unconstitutionally discriminate against the United States was predicated on the ground that the states have exclusive power to control the devolution of property, free from constitutional limitations. But, as we have shown *supra*, p. —, the United States, as established by the Constitution, may take testamentary gifts as an inherent aspect of the sovereignty created thereby and a state's power over the devolution of property is subject to constitutional limitations, including the supremacy clause of Article VI. In these circumstances, since the sovereign power of the United States is of at least equal dignity and character as that of California (cf. *Pufahl* v. *Estate of Parks*, 299 U. S. 217, 227), Section 27, by denying the right to the United States to receive testamentary gifts under wills of California domiciliaries and granting such right to the State of California discriminates against the United States in violation of the prohibition of Article VI against discrimination against rights granted by the Constitution and laws passed pursuant thereto. *Testa* v. *Katt*, 330

Supreme Court. *Irving Trust Co.* v. *Day*, 314 U. S. 556, the third case principally relied on by the California Court, is irrelevant here; it did not involve any questions as to the validity of testamentary gifts to the United States.

U. S. 386; *Pufahl* v. *Estate of Parks*, 299 U. S. 217; *McKnett* v. *St. Louis & S. F. Ry. Co.*, 292 U. S. 230; *Mondou* v. *New York, N.H., & H.R. Co.*, 223 U. S. 57-58; *Minneapolis & St. L.R. Co.* v. *Bombolis*, 241 U. S. 211, 222; *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543, 546-547 (C.A. 8). The discrimination here is particularly shocking since the right involved is that of the United States stemming directly from the Constitution in contrast to the usual situation where the right is that of a private individual flowing from an act of Congress passed in the exercise of power vested in it by the Constitution.[8]

There are appended hereto copies of the opinion of the Supreme Court of California and of the District Court of Appeals, State of California, First Appellate District.

THE UNITED STATES OF AMERICA,
BY: PHILIP B. PERLMAN,
Solicitor General.

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[8] The fact that Section 27 also declares states, other than the State of California, ineligible to receive testamentary gifts is immaterial, for the supremacy clause is not applicable in matters concerning the relationship of states *inter se*. Cf. *Testa* v. *Katt*, 330 U. S. 386, 393-394.

OPINION OF THE SUPREME COURT

SPENCE, J.—This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and 13 nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to "The United States Government U.S.A." Appellant maintains that the "United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident" thereof, that the testamentary "bequest" is therefore "void", and that all of the estate should be distributed to the "heirs at law of deceased under and pursuant to the laws of succession of" this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved.

[1] At the outset it should be said that the authorities without exception hold that "the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes." (*In re Walker*, 110 Cal. 387, 390 [42 P. 815, 52 Am. St. Rep. 104, 30 L.R.A. 460]; see, also, *Estate of Carpenter*, 172 Cal. 268, 269 [156 P. 464, L.R.A. 1916E 498]; *Estate of Wilkinson*, 113 Cal. App. 645, 646 [298 P. 1037].) The Legislature may withhold the right altogether, or impose any conditions or limitations upon it which it chooses. (*Estate of Durlewanger*, 41 Cal. App. 2d 750, 752 [107 P. 2d 477]; *Estate of Bauer*, 51 Cal. App. 2d 636, 637 [124 P. 2d 630].) [2] As a necessary postulate of this proposition, it follows that the Legislature has the exclusive power to designate those whom the testator may make the objects of his bounty. (*In re Wilmerding*, 117 Cal. 281, 284 [49 P. 181].)

[3] Equally well settled is the general rule that the distribution of a decedent's personal estate is governed by the law of his domicile. (*Estate of Sloan*, 7 Cal. App. 2d 319, 333-334 [46 P. 2d 1007].) It was early recognized in decisions of this state—as *Estate of Apple*, 66 Cal. 432, 436-437 [6 P. 7]; *Whitney* v. *Dodge*, 105 Cal. 192, 197-198 [38 P. 636]; *Estate of Lathrop*, 165 Cal. 243, 247 [131 P. 752]—and it is likewise declared by section 946 of the Civil Code.

In the light of these established principles, the language of section 27 of the Probate Code, prescribing "who may take by will," must be construed as determinative of the validity of the bequest here in question. That section reads as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

[4] The government cites the opening language of the statute, in its designation of "the state" as a proper recipient of a "testamentary disposition," as embracing the United States. But in construing a statute, words are to be taken in their ordinary sense and normal signification (23 Cal. Jur. §109, p. 730; *Taylor* v. *Lundblade*, 43 Cal. App. 2d 638, 641 [111 P. 2d 344]; *Gayer* v. *Whelen*, 59 Cal. App. 2d 255, 262 [138 P. 2d 763]), and the government's suggested extension of the meaning of "the state" runs counter to this settled rule. Although it must be recognized that historians and other writers frequently use the literary or rhetorical expression and refer to the nation as "the state," the drafts-

men of legislation as a rule employ language notable for its precise and definitive character rather than for its elegance. So it would appear that if the Legislature had intended to include the United States within the purview of the statute, " 'the ordinary dignities of speech would have led' to its mention by name." (*United States* v. *Cooper Corporation*, 312 U. S. 600, 606 [61 S. Ct. 742, 85 L. Ed. 1071], citing *Davis* v. *Pringle*, 268 U. S. 315, 318 [45 S. Ct. 549, 69 L. Ed. 974].) Also the collocation of the successively authorized recipients of a "testamentary disposition" should be taken into consideration in construing the meaning of the terms of the statute. (23 Cal. Jur. § 110, p. 732; *People* v. *One 1940 Chrysler Coupe*, 48 Cal. App. 2d 546, 549 [120 P. 2d 117].) Here the collection of "the state" is with "counties" and "municipal corporations," an obvious incongruity if the government's contention were accepted.

Moreover, the statute uses the *definite* article in its mention of "the state," ostensibly to signify California and to distinguish its purport from the *indefinite* reference of "a state," which latter term might reasonably be construed to mean any established government on earth. So pertinent is the legislative history of section 27 of the Probate Code. As first enacted in 1872 as section 1275 of the Civil Code, it was provided that "no corporation" could take from a California testator "unless expressly authorized by statute" so to do. In 1873 the section was amended so that corporations "formed for scientific, literary, or solely educational purposes" might take under such a will. (Amendments to the codes, 1873-74, p. 275.) In 1881 a separate statute was enacted authorizing the "several counties, cities and counties, cities and towns of this state to accept . . . any gift, bequest and devise . . ." (Stats. 1881, p. 2.) In 1903, section 1275 was amended to permit corporations formed for "hospital purposes" also to take under a will. (Stats. 1903, p. 258.) In 1905, the section was further amended to permit "counties" and

"municipal corporations" to take under a California will, subject to the provisions of section 1313, the antecedent of section 41 of the Probate Code concerning "restrictions" upon charitable bequests and devises (Stats. 1905, p. 605), and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 1275.) Manifestly, therefore, when "counties" and "municipal corporations" were so engrafted into section 1275, they carried the same geographical meaning of territorial components of this state as the "act of 1881" had expressly given them, and which they had signified for 24 years. Then in 1931, when, upon adoption of the Probate Code, the Legislature added to the list of entities privileged to take under a California will "the state" in connection with "counties" and "municipal corporations," it could not have meant any state other than California.

The case of *United States v. Fox*, 94 U. S. 315 [24 L. Ed. 192], is closely in point. There the testator, a resident of the state of New York, "devised and bequeathed" all his property "to the government of the United States." The statute of New York provided that a devise of lands might be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question presented for consideration was "the validity of a devise to the United States of real estate situated in the State of New York." The Supreme Court of the United States declared (as the state court had, 52 N. Y. 530, 534 [11 Am. Rep. 751]) that "this question" was "to be determined by the laws of [New York]." (94 U. S. 320.) Then the court, speaking through Mr. Justice Field, stated at page 321 as follows: "The term 'person'

as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. . . . A devise to the United States of real property situated in that State [New York], is, therefore, void."

It is true that the New York law imposed limitations affecting only devises of "real estate" while the present case concerns the validity of a bequest of personalty under a statute regulating alike the power of a testamentary disposition as to real and personal property. But such difference in statutory scope does not militate against the applicable force here of the reasoning in the Fox case, based as it is on the right of a state to prescribe who can, and who cannot, take by the will of one of its residents. So significant is the case of *United States* v. *Perkins*, 163 U. S. 625 [16 S. Ct. 1073, 41 L. Ed. 287], wherein the "single question" presented was "whether *personal* property bequeathed by will to the United States [was] subject to an inheritance tax under the laws of New York." (Emphasis added.) Recognizing the right to make a testamentary disposition as "purely a creature of statute and within legislative control" (p. 627), and that when a state "grants" such right, it may annex "any conditions which it supposes to be required by its interests or policy" (pp. 629-630), the court, following citation of the Fox case, *supra*, sustained the propriety of the tax—in "diminution" of the amount of the United States would receive under the will—as it was "only upon [such] condition that the legislature assent[ed] to [the] bequest" (p. 630). And as recently as 1942 the Supreme Court of the United States in *Irving Trust Co.* v. *Day*, 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093], wherein was attained the validity of a section of the "New York Decedent Estate Law" concerning the right of a surviving spouse

to elect to take against the provisions of a will, cited both the Fox and Perkins cases, *supra,* among others, in support of its broad statement at page 562, as follows: "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and *the dead hand rules succession only by sufferance.* Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (Emphasis added.) (See, also, *Allen* v. *Markham,* 156 F. 2d 653, 659; *Clark* v. *Allen,* 331 U. S. 503, 517 [67 S. Ct. 1431, 91 L. Ed. 1633, 170 A.L.R. 953].)

The government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, "serious constitutional questions would arise" involving an "unlawful discrimination against the United States" is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, *supra,* and the claim that assuming "the Fox case cannot be distinguished, it must be regarded as overruled" are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a "corporation . . . expressly authorized by statute" aid the government in its attempt to uphold the validity of the bequest in question. Whether or not the word "corporation" in such "legislative environment" would include the United States as a "governmental body" (see *State of Ohio* v. *Helvering,* 292 U. S. 360, 370 [54 S. Ct. 725, 78 L. Ed. 1307]; *State of Georgia* v. *Evans,* 316 U. S. 159, 161 [62 S. Ct. 972, 86 L. Ed. 1346]), the further requirement of the section is concededly unsatisfied in the government's admission that though "various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and

to apply it to stated uses . . . no Federal statute of general application has purported to authorize the United States to so acquire property." [5] It is true that the capacity of the United States to "receive a voluntary devise or bequest" has been regarded as an "inherent attribute of sovereignty" and so sustained as an implied power of the federal government, but such principle has no force where there is an "express statute" of the state wherein "the testator has his domicil" effecting a restriction as to who may be devisees or legatees. (*Dickson* v. *United States*, 125 Mass. 311, 315 [28 Am. Rep. 230].) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take "under a will." (*United States* v. *Fox, supra*, 94 U. S. 315; *United States* v. *Perkins, supra*, 163 U. S. 625; *Irving Trust Co.* v. *Day, supra*, 314 U. S. 556.)

[6] Nor does it strengthen the government's position to refer to section 13841 of the Revenue and Taxation Code, which exempts "property transferred to . . . the United States" from the California inheritance tax. There is no necessary connection between a statute regulating succession to property and one setting forth tax exemptions, and in making laws relating to these two subjects, over which it had plenary authority, the Legislature was not bound to shape its respective enactments to fit any particular pattern or limit its right to impose such conditions as it deemed appropriate in the distinct fields. (*In re Wilmerding, supra*, 117 Cal. 281, 286-287.) There may be, for example, a transfer of property—the residue of a veteran's pension fund—to the United States under the federal escheat laws (*Estate of Lindquist*, 25 Cal. 2d 697, 705 [154 P. 2d 879], cert. den. 325 U. S. 869 [65 S. Ct. 1408, 1410, 89 L. Ed. 1988]; *Estate of Walker*, 25 Cal. 2d 719, 720 [154 P. 2d 891], cert. den. 325 U. S. 869 [65 S. Ct. 1408, 1410, 89 L. Ed. 1988,

1989]) or in pursuance of a contract whereby a veteran, prerequisite to entry into a national soldiers' home, agreed that all his personal property should pass to the board of managers of such home under certain circumstances. (*United States* v. *Stevens*, 302 U. S. 623 [58 S. Ct. 388, 82 L. Ed. 484]; *Mauck* v. *United States*, 94 F. 2d 745). But such situations do not furnish any parallel considerations negativing the force of section 27 of the Probate Code as determinative of rights of testamentary disposition of property "within [the] dominion" of this state. (*United States* v. *Perkins*, *supra*, 163 U. S. 625, 629.)

The government finally relies on the *Estate of Hendrix*, 77 Cal. App. 2d 647 [176 P. 2d 398], to sustain the bequest in question, but an analysis of that case shows it to involve quite dissimilar considerations. There the bequest was made to the "United States Veterans Administration . . . for the purpose of rendering to disabled veterans of the world war . . . such aid, comfort, [and] assistance . . . as may to them be most helpful and profitable; determinable by said . . . [organization]." (P. 649.) As the successor of "a corporation, 'The National Home for Disabled Volunteer Soldiers'" (p. 652), the "Veterans' Administration" is authorized, through its "Board of Managers," to "receive donations of money or property . . . [which would] embrace gifts by means of wills, as well as by transfers during the lifetime of the donors." (P. 653.) Upon classifying the Veterans Administration as a "governmental agency," though unincorporated, and in discussing its testamentary capacity to accept the bequest in question under the laws of California (Prob. Code, § 27), the court declared that "the bequest to the agency was, in effect, a bequest to the parent, United States of America" (p. 651), that "the United States Government is a corporation" (p. 652), that "the [agency] is authorized by statute to take property by will" (p. 652), and that therefore the United States Government, functioning through one of its

component parts in a designated field of operation, is a "corporation . . . expressly authorized by statute" to "take [property] under a will" within the purport of section 27 of the Probate Code. (P. 653.) But the validity of the bequest there involved need not rest on that ground, for, as the court indicated in its reference to the analogous considerations prevailing in the *Estate of Yule*, 57 Cal. App. 2d 652 [135 P. 2d 386], the terms of the will, as reasonably construed, provided for "a gift for charitable purposes to a legally constituted institution" (p. 654), and whether or not such recipient was "incorporated" or "unincorporated" was not a material factor affecting its capacity to take the "donation" as so restricted. Accordingly, the bequest to the United States Veterans Administration was properly deemed valid in the light of the liberal provisions of the statute evidencing the legislative purpose to favor "gifts for charitable purposes" in pursuance of "the intent of the donor" (*Estate of Yule, supra*, p. 654), and the further discussion in the Hendrix case relative to the propriety of holding the "United States of America" to be a "corporation authorized to take by will pursuant to Section 27 of the Probate Code" (p. 650) was unnecessary to the decision, and certainly will not be regarded as furnishing ground for sustaining a bequest to the "United States Government," without qualification as to administration or purpose. From these underlying considerations—both factual and legal—distinguishing the essential focal point of decision, it is manifest that the government's reliance upon the Hendrix case in nowise strengthens its position here. In view of the nature of the power of testamentary disposition, the right of the state to determine the limits under which this power shall be exercised, and the express terms of section 27 of the Probate Code prescribing "who may take by will," the bequest here challenged cannot be sustained as meeting the test of the cited statute, and hence is void.

The order subject of this appeal is reversed.

Gibson, C.J., Shenk, J., Carter, J., and Schauer, J., concurred.

Edmonds, J., concurred in the judgment.

TRAYNOR, J.—I dissent for the reasons set forth in *Estate of Hendrix*, 77 Cal. App. 2d 647, 651-653 [176 P. 2d 398].

OPINION OF THE DISTRICT COURT OF APPEALS

GOODELL, J.—The decedent, a resident of San Francisco, left a will reading as follows:

"June 30, 1932,
205—3rd St.,
San Francisco, California.

This is my last Will & Wish
That I give all I own & possess to the United States government U.S.A.
The beneficiary shall be executor
My body shall be cremated after death
Signed Gust Burnison
Approved July 27, 1944."

The testator left personal property appraised at $22,668.70. His heirs at law are three brothers, a sister, and thirteen nieces and nephews, all of whom petitioned for distribution of the whole estate to themselves on the ground that "the United States of America is not authorized by statute or otherwise to take under a will" executed in California by a resident of this state. The United States filed written objections thereto which the court sustained. From the order denying the petition for distribution the heirs appeal.

"At the outset of this consideration it is proper to say that the right to make testamentary disposition of property is not an inherent right or a right of citizenship, nor is it even a right granted by the constitution. It rests wholly upon the legislative will, and is derived entirely from the statutes."

(*Estate of Walker*, 110 Cal. 387, 390 [42 P. 815, 52 Am. St. Rep. 104, 30 L.R.A. 460].)

"Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction." (*Irving Trust Co.* v. *Day*, 314 U. S. 556 [62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093].)

[1] By Section 27 of the Probate Code our Legislature has prescribed "Who may take by will" as follows: "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

The government argues that the phrase "A testamentary disposition may be made to the state" may be interpreted as including the United States. While it is true that historians and other writers frequently adopt the literary or rhetorical expression and speak of the nation as "the state," the draftsmen of legislation as a rule choose language for its definiteness rather than its elegance. Surely if the Legislature had intended to include the federal government it would have named it. As aptly said in *United States* v. *Cooper Corp.*, 312 U. S. 600, 606 [61 S. Ct. 742, 85 L. Ed. 1071], " 'the ordinary dignities of speech would have led' to its mention by name." Moreover, the collection of "the state" is with "counties" and "municipal corporations," an obvious incongruity if the government's argument were adopted.

That "the state" means only California is clear from the legislative history of section 27, which prior to 1931 was section 1275 of the Civil Code. The original section contained the provision "that no corporation can take under a will, unless expressly authorized by statute so to take."

In 1881 the Legislature adopted "An Act to authorize the several counties, cities and counties, cities and towns of this State, . . . to receive property by gift, bequest, and devise, . . ." (Stats. 1881, p. 2.) In 1905, an amendment carried "counties" and "municipal corporations" into section 1275, and the code commissioner's note shows that "The amendment in substance incorporates into the section the provisions of the act of 1881, page 2, authorizing the several counties, cities and counties, cities and towns of the state, to recover property by gift, bequest and devise." (See legislative history subjoined to section 27.) Clearly when "counties" and "municipal corporations" were thus added, those words went into section 1275 with the same geographical meaning which the act of 1881 had expressly given them, and which they had worn for 24 years. In 1931, then, when the Legislature added "the state" in connection with "counties" and "municipal corporations" it could not have meant any state other than California.

The case of *United States* v. *Fox*, 94 U. S. 315 [24 L. Ed. 192], is directly in point. The testator, a resident of the state of New York, devised and bequeathed all his property to the government of the United States. The statute of New York provided that a devise of lands may be made "to any person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise." The sole question was as to "the validity of a devise to the United States of real estate situated in the State of New York." The Supreme Court held (as the state court had, 52 N. Y. 530 [11 Am. Rep. 751]) that this question had to be determined by the laws of

New York. The court, speaking through Mr. Justice Field, said: "The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation,—but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended . . . A devise to the United States of real property situated in that State is, therefore, void."

True the New York law spoke only of devises of real property while the instant case deals with a bequest of personalty. The reasoning of the Fox case, however, based as it is on the right of a state to say who can, and who cannot, take by the will of one of its residents, applies with equal force to this case. Indeed the Supreme Court as recently as 1942 in the Irving Trust Co. case, *supra*, cited the Fox case as supporting its broad statement, already quoted, that "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."

The government's contention that if the state law should be construed as invalidating the bequest "serious constitutional questions would arise" is answered by the Irving Trust Co. case. Its claim that, assuming "that the Fox case cannot be distinguished, it must be regarded as overruled," is answered by the court's citation of it as recently as 1942.

It is not necessary to decide whether the words "authorized by statute" found in the last sentence of section 27 means a statute of this state only, or one of any state, or an act of the Congress, for the government says in its brief that "Various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses" and then frankly concedes that "On the other hand, no Federal statute of general application has pur-

ported to authorize the United States to so acquire property."

The government relies chiefly on *Estate of Hendrix*, 77 Cal. App. 2d 647 [176 P. 2d 398] and incorporates into its brief the brief it filed in that case. The bequest there was to the "United States Veterans Administration," an agency of the government. For the reasons appearing in the Hendrix opinion the questions presented in that case and in this are quite dissimilar. [2] This bequest is to the United States of America, without qualification. It is not to any agency of the government, incorporated or unincorporated, or to the government as trustee, or for any particular purpose or use, charitable, benevolent or otherwise. It is in the same general form as was the devise in the Fox case, hence the question presented is simply whether the United States *eo nomine* can take by will under our statute. To answer it otherwise than in the negative would be "to insert what has been omitted" from the statute (Code Civ. Proc., § 1858).

The government relies, also, on *Dickson* v. *United States*, 125 Mass 311 [28 Am. Rep. 230], where the court held valid a devise and bequest to the United States of America. In distinguishing the Fox case the court said that that case "proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legislature of that state." The court then said "The statutes of this Commonwealth, where the testator had his domicil, and part of his real estate lay, make no restriction as to who may be devisees or legatees . . ." The California statute, as we have seen, contains definite restrictions.

The order appealed from is reversed.

Nourse, P.J., and Griffin, J. pro tem., concurred.

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